

**IN THE INCOME TAX APPELLATE TRIBUNAL
“K” BENCH, MUMBAI**

**BEFORE SHRI VIKAS AWASTHY, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 1190/Mum/2019
(Assessment Year: 2013-14)**

Michael Page International Recruitment Pvt. Ltd. 5 th Floor, 2 nd North Avenue, Maker Maxity, Bandra Kurla Complex, Bandra (East), Mumbai-400051. PAN : AAGCM8425N	Vs.	DCIT 14(2)(2) Room No. 461, 4 th Floor, Aayakar Bhavan, M.K. Road, Churchgate, Mumbai-400020.
Appellant)	:	Respondent)

Appellant/Assessee by : Sh. Dhanesh Bafna / Sh. Pratik
Shah, Sh. Amol Mahajan & Ms.
Tejal Saraf, AR

Revenue/Respondent by : Ms. A. Alankrutha, Sr. DR

Date of Hearing : 14.12.2023

Date of Pronouncement : 26.12.2023

ORDER

Per Padmavathy S, AM:

This appeal is against the order passed by the Commissioner of Income Tax (Appeals)-57, Mumbai dated 28.12.2018 for the AY 2013-14.

2. The only issue contended in this appeal is the TP Adjustment made towards payments made by the assessee to its Associated Enterprises (AE) for availing shared services. The assessee also raised an additional ground contending the validity of final assessment order passed under section 143(3) r.w.s.144C relying on the decision of the Hon'ble Madras High Court in the case of Roca Bathroom Products Private Limited (WA No.1517 and 1519 of 2021 dated 9th June 2022). However during the course of hearing the Id AR did not press for the admission of additional grounds. Accordingly the additional ground is not admitted for adjudication.

3. The assessee is a private limited company engaged in the business of providing manpower recruitment and consultancy services to clients in India. The assessee filed its return of income for AY 2013-14 on 29.11.2013 electronically declaring a loss of Rs. 13,81,44,517/-. The case was selected for scrutiny and statutory notices duly served on the assessee. A reference was made to the Transfer Pricing Officer (TPO) in order to determine the Arm's Length Price (ALP) of the International Transactions entered into by the assessee with its Associated Enterprises (AE). During the Transfer Pricing (TP) proceedings the TPO noticed that the assessee has entered into various international transactions which included payment towards shared services availed to the tune of Rs. 5,98,33,677/-. The TPO called on the assessee to provide information regarding the specific activities performed by the AE and the specific benefits accruing to the assessee from the said services. The assessee submitted that it has received various services during the year such as ITeS, Finance, Marketing, Human Resources, Legal activities from its AEs located in Hong Kong, Australia and Singapore. The assessee further submitted that the said services were received pursuant to inter-company agreements entered into between the assessee and the

AEs and that the fees for rendering such services is charged by the AEs at actual cost + 10% mark up. The assessee further provided the details of methodology of allocation and invoices, emails, etc. in support of availing the inter group services. The TPO after perusing the various documentary evidences submitted by the assessee held that the assessee did not produce any primary evidence to show that the services are actually rendered by the AE except describing the nature of services, email correspondence, etc. The TPO further held that the assessee did not produce the details and quantum of expenditure incurred by the AE in rendering the services and that the assessee did not substantiate the benefits received. Accordingly, the TPO determine the ALP at Nil and made the TP Adjustment of the entire payment made by the assessee towards availing the said services amounting to Rs. 5,98,33,677/-. The AO passed the assessment order incorporating the TP Adjustment. Aggrieved, the assessee preferred further appeals before the CIT(A). Before the CIT(A) the assessee submitted additional evidences such as time sheet of employees, various documents to substantiate the benefits received, email correspondences, marketing materials. etc. The CIT(A) called for the remand report from the TPO. The CIT(A) after perusing the remand report and the rebuttal of the assessee upheld the determination of ALP at Nil and confirmed by the T.P. Adjustment by the TPO.

4. The Id. AR submitted that the assessee is engaged in the business of providing professional recruitment services and that the assessee has employed only those staff in order to provide professional recruitment services. The Id AR further submitted that the assessee does not have any staff to provide support functions such as Finance, Human Resources, Marketing, etc., locally in India and hence these support services are rendered by the AEs towards which the assessee made payments to AEs. The Id. AR also submitted that the basis of

recharge for availing these services from the AEs is the actual cost incurred by AEs i.e. direct and indirect, allocated to the assessee using standard allocation keys and by adding 10% mark up on the same. The ld. AR drew our attention to the various details submitted before the TPO including the inter company agreements (page 169 to 180). It is submitted by the ld. AR that the reason for computing the ALP at Nil is that the assessee could not substantiate the evidence for availing of services and the benefits. In this regard the ld. AR submitted that the assessee during the course of appellate proceedings has submitted various details including the detailed break up of cost of each services incurred by the AEs with time sheet of various employees of AEs who rendered services to the assessee (page 347 to 524 of the PB). The ld. AR further submitted that the various documents substantiating the receipt of services (page no. 525 to 757 of PB) were submitted before the Appellate Authority. The ld. AR also submitted that the from the perusal of the various documentary evidences submitted, it would be clear that AEs are rendering services with regard to Human Resources, Marketing, finance and legal services. The ld. AR summarized his arguments stating that in spite of submitting various details evidencing the rendering of services and the benefits received, the TPO has proceeded to determine the ALP at Nil without any bench marking with uncontrolled transaction, which is not correct.

5. The ld. DR on the other hand, vehemently argued that one of the main reasons for determination of ALP at Nil is that the assessee could not substantiate the break-up of indirect cost incurred by the AEs which is one of the major elements of cost recharged to the assessee by the AE. The ld. DR further submitted that from the email correspondence it is only showing that the AEs are involved in approval process only which is not rendering of any actual services.

The Id. DR also submitted that as per the OECD Guidelines the Intra Group Services have to be tested on need, and benefit test and in assessee's case these two are not properly substantiated by the assessee. Accordingly, the Id. DR supported the order of the TPO.

6. We have heard the parties and perused the material on record. In the given case, the AEs situated in Australia, Hong Kong and Singapore various support services as listed below to the assessee –

*“Administrative support including finance, personnel, learning and development, legal and information technology services;
Marketing and internet support;
Local ad hoc IT installations and systems support;
Routine ad hoc local level operational support;
Any additional services as agreed between the Parties from time to time.”*

7. The assessee has entered into agreements with these AEs in this regard (page 169 to 177 of paper book) and as per the terms of the agreement, the AEs would recharge on actual cost incurred towards rendering of services with 10% mark up. The AEs raise invoices on the assessee towards the support services rendered and payments made by the assessee during the year under consideration amounts to Rs.5,98,33,677. The assessee bench marked the said international transactions by adopting Transaction Net Margin Method (TNMM) as the most appropriate method where the AEs are taken as the tested parties. As per the bench marking, the arithmetic mean margin of the comparables (page 110 of paper book) was 11.81%. Since the mark up charged for the assessee is 10%, the amount charged by AEs towards rendering of shared services to the assessee was considered to be at arm's length. The TPO proceeded to compute the ALP of the transaction AT Nil, for the reason that the evidences submitted are inadequate, the need to for availing services not substantiated, break up of the cost are not

submitted. Before the CIT(A), the assessee submitted further evidences and a remand report was called for. Based on the remand report the CIT(A) confirmed the determination of ALP at Nil by the TPO. We notice that the assessee has submitted substantial documents in the form of agreements with AEs, details of cost recharged, employee wise cost details allocated to assessee, details of employee wise time sheet evidencing the time spent by various employees towards rendering services to various countries including assessee in India, email correspondence in support of nature and benefit of the services rendered (pages 347 to 757 of paper book). From the perusal of these records it is evident that the assessee before the lower authorities have submitted evidences in support of rendering of services, the benefits derived, basis of allocation of cost i.e. allocation key etc. and therefore we are of the considered view that lower authorities were not justified in holding that no services were rendered by the AEs in respect of which payments were made by the assessee.

8. The assessee before the lower authorities submitted that the assessee does not have any local support staff and therefore the HR, Finance, ITes, Legal services etc., are availed from the regional support centres of the AEs and that there is no duplication of services. In this regard we notice that the revenue has not disputed these submissions of the assessee but has determined the ALP at Nil on the basis that assessee has failed to justify/prove rendition, receipt and benefit of this expenditure. This contention of the revenue in our considered view is not tenable since the revenue has not brought anything on record to find any fault in the benchmarking analysis conducted by the assessee i.e. benchmarking of international transactions pertaining to payment of shared services adopting TNMM but has simply determined the ALP at Nil. The TPO also neither undertook any benchmarking analysis by adopting any of the prescribed methods

under the Act nor searched any comparable transaction for considering the arm's length price at NIL. The argument of the Id DR is that the TPO has applied CUP method for determination of ALP at NIL cannot be accepted for the reason that for the purpose of determining the ALP by applying the CUP method Rule 10B of the Income Tax Rules provides that

10B . (1) For the purposes of sub-section (2) of section 92C, the arm's length price in relation to an international transaction [or a specified domestic transaction] shall be determined by any of the following methods, being the most appropriate method, in the following manner, namely :—

- (a) *comparable uncontrolled price method, by which,—*
 - (i) *the price charged or paid for property transferred or services provided in a comparable uncontrolled transaction, or a number of such transactions, is identified;*
 - (ii) *such price is adjusted to account for differences, if any, between the international transaction [or the specified domestic transaction] and the comparable uncontrolled transactions or between the enterprises entering into such transactions, which could materially affect the price in the open market;*

9. However, in the present case, the lower authorities without searching for similar uncontrolled transaction between non associated enterprises just proceeded to treat the value of the international transaction to be at NIL. In this regard, we notice that a similar issue is considered by the coordinate bench in the case of Sulzer Tech India (P.) Ltd vs ACIT, NFAC [2022] 142 taxmann.com 246 (Mumbai - Trib.) where it has been held that -

23. As noted above, in the present case, no search was conducted to find out the independent entity in a comparable transaction and the arm's length price of the international transaction was treated to be NIL. In the present case, no doubts about payments made by the assessee have been raised by the Assessing Officer under section 37 of the Act. Further, accrual of benefit to assessee or the commercial expediency of any expenditure incurred by the assessee cannot be the basis for

disallowing the same, as held by Hon'ble Delhi High Court in the case of CIT v. EKL Appliances Ltd. [2012] 24 taxmann.com 199/209 Taxman 200/345 ITR 241.

24. We further find that Hon'ble jurisdictional High Court in CIT v. Lever India Exports Ltd. [2017] 78 taxmann.com 88/246 Taxman 133 (Bom.), observed as under:

"7. We note that the Tribunal has recorded the fact that the respondent assessee has launched new products which involved huge advertisement expenditure. The sharing of such expenditure by the respondent assessee is a strates to develop its business. This results in improving the brand image of the products, resulting in higher profit to the respondent assessee due to higher sales Further, it must be emphasized that the TPO's jurisdiction was to only determine the ALP of an International Transaction. In the above view, the TPO has to examine whether or not the method adopted to determine the ALP is the most appropriate and also whether the comparables selected are appropriate or not. It is not part of the TPO's jurisdiction to consider whether or not the expenditure which has been incurred by the respondent assessee passed the test of section 37 of the Act and/or genuineness of the expenditure. This exercise has to be done, if at all, by the Assessing Officer in exercise of his jurisdiction to determine the income of the assessee in accordance with the Act. In the present case, the Assessing Officer has not disallowed the expenditure but only adopted the TPO's determination of ALP of the advertisement expenses. Therefore, the issue for examination in this appeal is only the issue of ALP as determined by the TPO in respect of advertisement expenses. The jurisdiction of the TPO is specific. and limited le. to determine the ALP of an International Transaction in terms of Chapter X of the Act read with rules 10A to 10E of the Income-tax Rules. The determination of the ALP by the respondent assessee of its advertisement expenses has not been disputed on the parameters set out in Chapter X of the Act and the relevant Rules. In fact, as found both by the CIT (A) as well as the Tribunal that neither the method selected as the most appropriate method to determine the ALP is challenged nor the comparables taken by the respondent assessee is challenged POOJA by the TPO. Therefore, the ad hoc determination of ALP by the TPO de hors section 92C of the Act cannot be sustained."

25. In view of the above, we are of the considered opinion that TPO as well as learned DRP were not justified in treating the value of international transaction of 'Payment of Corporate IT Support Services' to be NIL, in the present case. Accordingly, ground No. 2, including grounds no. 2.1 to 2.3, raised in assessee's appeal are allowed.

10. In order to justify the cost allocation based on the allocation key, the ld AR submitted that that the same is as per the OECD guidelines. In this regard, it is relevant to note the following paragraphs of OECD guidelines:-

“7.23 In such cases, MNE groups may find they have few alternatives but to use cost allocation and apportionment methods which often necessitate some degree of estimation or approximation, as a basis for calculating an arm's length charge following the principles in Section B.2.3.”

“7.25 The allocation should be based on turnover, or staff employed, or some other basis. Whether the allocation method is appropriate may depend on the nature and usage of the service. For example, the usage or provision of payroll services may be more related to the number of staff than to turnover etc.”

11. We notice that the coordinate bench of the Tribunal in Jabil Circuit India Private Limited v/s ACIT, [2018] 100 taxmann.com 165 (Mum.), after considering the OECD guidelines upheld the usage of allocation keys for allocation of intra-group services. The relevant findings of the coordinate bench in the aforesaid decisions are as under:-

“28. We note that it is the claim of the assessee that the assessee has intra group AEs spread around the length and breadth of the globe. It has been claimed that the intra group services have been allocated on the basis of global agreement among the AEs. Proper allocation keys have been used and that the methodology adopted has the mandate of guiding of the OECD. In this regard, we note that in the OECD guidelines in the Chapter VII relating to special consideration for intra group services has observed that mainly two issues were to be considered, one was whether intra group service have in fact been provided. The other issue is whether the intra group charge for such services for tax purpose should be in accordance with the arms length principle. The OECD guidelines interalia also provide that the allocation of the group cost might be based upon the turnover or staff employed or some other basis. It mentioned that whether the allocation method is appropriate may depend upon the nature and use of the services. A reading of this OECD guidelines makes it abundantly clear that contrary to the Revenue's argument, the using of allocation keys for allocation of intra group services is not alien to international tax jurisprudence. Further, the allocation of concerned group expenses to different accounting units is a duly accepted accounting procedure.”

12. Considering the facts and circumstances and the perusal of documents submitted in the present case, we are of the view that once availing of various services from the AEs is duly substantiated by the documentary evidence and the cost allocation among the group companies is also on the basis of a well-accepted allocation key method, there is no basis in upholding the transfer pricing adjustment made by the TPO/AO. Accordingly, the AO is directed to delete the transfer pricing adjustment on account of payment of shared service charges paid by the assessee to the AEs.

13. In result the appeal of the assessee is allowed.

Order pronounced in the open court on 26-12-2023.

Sd/-
(VIKAS AWASTHY)
Judicial Member

Sd/-
(MS. PADMAVATHY S)
Accountant Member

**SK, Sr. PS*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. DR, ITAT, Mumbai
4. Guard File
5. CIT

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai